

In Praise of the Five-Percent Hurdle

VB verfassungsblog.de/in-praise-of-the-five-percent-hurdle/

Christoph Schönberger Fr 27 Sep 2013

Fr 27 Sep
2013

The five-percent hurdle is as much a fixture of the Federal Republic of Germany as is the Free Democratic Party (FDP). And now following the parliamentary elections for the Bundestag on 22 September it does seem as if these old acquaintances could both find their final resting place in Bonn's "House of the History of the Federal Republic of Germany" – alongside Helmut Kohl's cardigan. With the FDP and the Alternative for Germany (AfD) having fallen short of the five-percent electoral threshold, and with 15 percent of the votes going to parties unable to breach this barrier, the five-percent hurdle has once more become the target of criticism. Opponents castigate it as an undemocratic impediment, as a Maginot Line of established parties vis-à-vis the variegated political currents in German society. They call for the *aggiornamento* of a political system that can indeed come off as overprotective and stifling.

In constitutional law the groundwork for this criticism has long been laid. Some time ago, with German thoroughness, the Federal Constitutional Court radicalized its interpretation of electoral equality within the terms of proportional representation. This culminated in rejection of the five-percent hurdle for the 2011 German European election. Hitherto the court has naturally stopped short of addressing the electoral law for the German state parliaments (*Landtage*) and the German Bundestag and has mainly justified the provision for the Bundestag elections with the rationale that it creates stable governments. This must not necessarily remain the case. Shifts in the party system and changes in voting behavior could serve as a basis for the court to also change its position in this regard.

Would that make political sense from the standpoint of democratic theory and could it square with constitutional law? The clear answer is no. That is a plain and simple imperative of political prudence. That which has greatly contributed to the stability of the federal German political system over long decades cannot simply be scrapped as the result of a single Bundestag election. In recent years the electoral law has been subject to many half-baked proposals for change. The electoral system and voting behavior are interrelated at many levels, and so the electoral law must be tended to and further developed with extreme care.

The electoral result of 22 September does not exactly support the thesis that the old West German parties could have entrenched themselves behind the provision. When a traditional party like the FDP is unable to clear the five-percent hurdle while a newcomer like the AfD can almost clear it without any real political run-up, then the party system here shows itself to be flexible rather than rigid and fossilized. And despite the electoral threshold, the Pirate Party has succeeded in entering certain individual state parliaments. This was also seen in the past with emergence of the Green Party and the Party of the Left. It is certainly correct that the electoral threshold makes demands on a new party, but it can never be accused of helping to establish a closed shop, as it were, and today less than ever.

Also thoroughly remarkable is the fact that the provision came in for criticism precisely at the moment when it had fulfilled its task. When the party system grows more diffuse, when myriad small parties press for parliamentary seats, then this is precisely the situation that the five-percent threshold was designed to address. It is an emphatic encouragement for the political concentration necessary in a party system. And it was thanks to the five-percent hurdle that the party system in the German Bundestag rapidly gained stability in the 1950s – a stability which had been decidedly lacking in the period up until 1949, when the West German parliament was reminiscent of the last elected Reichstag in the Weimar Republic.

The five-percent threshold challenges someone who should like to cast their vote for a new or small party with the possibility that their vote will not be reflected in the Bundestag's final constitution, and in this way it tests the earnestness of that voter's agenda by posing the intrinsic and emphatic question as to whether his political convictions or interests truly require yet another party in parliament. The five-percent threshold demands of the voter that he not only express his highly personal attitudes but that these attitudes be examined for their

generalizability. In other words, the five-percent threshold treats him like an adult.

Of course this challenge has long had a difficult time of it in Germany. From our extended period of constitutional monarchy we have inherited the central idea that parliament must accurately reflect society in all its variety and color. This idea stems from the time when parliament fancied itself a kind of counterweight to the reigning monarch and prevailing bureaucratic order. Parliament not only has the task of expressing the plurality of society but it is a place where the citizenry can arrive at shared rules and orientations through their representatives. This function of manufacturing consensus is even stronger in a parliamentary governmental system, where the government depends on support of the parliamentary majority. The paradoxical price for the government being dependent on parliament is guidance of the parliamentary majority via the government.

In Germany we do not gladly pay this price of democratic self-government. Rather every group, every interest, yearns to be reproduced in parliament in as unalloyed a fashion as possible – similar to how they also aspire to bring forward their respective agendas in the text of the constitution. This of course overtaxes the parliament and conversely leads to the remarkable practice of the public debate consisting almost exclusively of voices that also have a seat and a voice in the German Bundestag. The parliamentary election functions as a kind of placement for legitimate public speaking, and with the consequence that failure to clear the five-percent hurdle simultaneously means invisibility in terms of the public discussion. Here we see a very unhappy conjoining of our old corporatist rituals with the Weimar neuroses of the Federal Republic's first decades.

The actual problem is not the five-percent threshold but the extrusion of peripheral persons, opinions and interests from the public debate and particularly from those media regulated by public law. This was demonstrated for all to see when Rainer Brüderle was thrown off the “Bonner Runde” the evening of the Bundestag elections. Of course one mustn't stock the medial discussion solely with a variety of rightist nuts, computer nerds and Euro-critical dignitaries. But it would enhance the public debate in the Federal Republic if they allowed for a broader spectrum of views than what the Bundestag parties are capable of expressing – and not leaving the unorthodox positions to the shallow forum of the Internet. Here is where we require actual reform, and it involves the debate culture of German society at large.

If the public debate is perceived as all too exclusive, and with an increasing pluralization of opinions and views, then the five-percent hurdle is not to be tolerated. There is then the paradoxical effect of it being necessary to enter within the walls of parliament to be at all part of the outside public debate. The five-percent threshold structures and channels the later parliamentary decision-making process. But that means that as a countermove the public discussion must be all the more free, open and varied in the pre-parliament space. The five-percent hurdle loses its democratic legitimacy if enjoined to also perform the role of thought-police of the public space. We need both – the hurdle and the debate!

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Schönberger, Christoph: *In Praise of the Five-Percent Hurdle*, *VerfBlog*, 2013/9/27, <http://verfassungsblog.de/in-praise-of-the-five-percent-hurdle/>.